

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

WHITLA & NELSON,

Petitioner.

v.

SAMUEL L. BOYD, as Trustee in Bankruptcy of
THE LANE LUMBER COMPANY, LIMITED,
a Corporation Bankrupt, and L. C. WIL-
SON, RECEIVER OF THE STATE BANK
OF COMMERCE OF WALLACE, IDAHO,
Respondents.

In the Matter of THE LANE LUMBER COM-
PANY, LIMITED, a Corporation, Involuntary
Bankrupt.

On Petition for Revision From the United States
District Court for the District of Idaho,
Northern District.

Motion to Dismiss Petition for (Review) Revision.

E. N. LA VEINE,
Attorney for Respondent, Trustee.
Coeur d'Alene, Idaho,

JOHN H. WOURMS,
Attorney for Respondent, State Bank of Commerce,
Wallace, Idaho,

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MOTION.

Now comes Samuel L. Boyd, trustee of the Lane Lumber Company, Limited, a corporation, bankrupt, and L. C. Wilson, Receiver of the State Bank of Commerce of Wallace, Idaho, the designated Respondents in the foregoing proceedings, and hereby make a special and limited appearance for the sole purpose of moving to dismiss the Petition for (review) Revision filed by Whitla & Nelson, Petitioners, for the following reasons:

The petitioners seek to have revised:

A QUESTION OF LAW, whether the trustee

by not appearing at the hearing on the bankrupt's attorney's fees, waived his objections to said claim, or was required by law to file exceptions to the allowance of said claim in the sum of \$2750, (Trans. p. 7) in addition to filing the petition for review of the referee's order which set forth the trustee's assignment of error. (Tran. p. 44). Also

A QUESTION OF FACT, whether the District Judge erred in reducing Petitioner's attorney's fee from \$2750 to \$385, for services as attorneys for the bankrupt. Our grounds for dismissal are:

1. That the said petition presents a question of law, within the revisory jurisdiction, and a question of fact within the appellate jurisdiction of the Circuit Court of Appeals.

2. Appeals cover both questions of law and fact but revisions permit the presentation of only questions of law.

3. That petition for Revision is not the proper method to bring both of the above questions before the Circuit Court of Appeals; no error of law could be predicated upon the reduction, because it was made upon evidence from which men of different minds might draw different conclusions. An issue of this nature is a question of fact, reviewable by appeal and not by Petition for Revision.

Notice is hereby given that this motion will be

called up for hearing on the 13th day of February, 1914, at 10:00 A. M., or as soon thereafter as counsel can be heard. This motion will be made and based upon petition and transcript of the record filed and served upon the above designated Respondents.

Dated January 10th, 1914.

E. N. LAVEINE

Attorney for S. L. Boyd, Trustee.

JOHN H. WOURMS

Attorney for State Bank of Commerce.

ARGUMENT.

When this motion is presented the attorney for the trustee will be charged with being extremely technical and the echo will be heard from the Golden Gate to the virgin forests of Idaho.

Now let us see what has happened in these proceedings.

On December 11, 1912, the petitioners filed with the referee, Lawrence L. Lewis, before whom the Lane Lumber Company Bankruptcy proceedings are pending, their petition for "allowance of attorney's fees as bankrupt's attorneys." (Trans. p. 5).

To said petition, on April 5, 1913, objections were filed by L. C. Wilson, Receiver of the State Bank of Commerce of Wallace, Idaho, the largest unsecured creditor of the bankrupt holding a claim in the sum of about \$200,000; also by the Bank of California, next to the largest unsecured creditor of

the bankrupt holding a claim in the sum of about \$100,000, both of which claims had been allowed prior to the filing of said petition. Both of these creditors were represented by able counsel. (Trans. p. 18 to 20).

An order was made by the referee, and notice given to creditors, setting the hearing on said petition, with other matters, which was had on March 26, 1913. (Trans. p. 23).

The trustee, and his attorney, naturally knew of the great interest the Bank of Commerce and the Bank of California were taking in said matter; being desirous of saving the estate all unnecessary expense possible they decided to permit the parties who had objected to the allowance to settle the matter, in so far as the referee was concerned.

On said date the hearing was had and on May 19, 1913, the said referee made an order allowing the attorneys for the bankrupt every cent claimed, to-wit, \$2750. (Trans. p. 39).

Something had happened and the trustee and his attorney saw, that notwithstanding their policy of economy, they would have to take a hand in the matter.

On May 28, 1913, the undersigned attorney for the trustee prepared, and secured the joinder of the State Bank of Commerce in, the petition for review,

of said allowance, before the Federal Judge, Hon. F. S. Deitrich. (Trans. p. 43 to 48).

The matter was certified to said Judge and argued. Thereafter on July 7, 1913, he rendered his decision reducing said claim from \$2750 to \$385, 206 F. 780.

AS TO THE PURPORTED QUESTIONS OF
LAW, TRANSCRIPT p. 7.

Section 2, Clause 10 and Gen. Ord. No. 27, do not contemplate nor require that the "bankrupt, creditor, trustee," or other person who shall desire a review by the judge of any order made by the referee shall appear before the referee in person when the proceedings are had. If the petitioner is willing to rely upon the referee's record, for use before the district judge, and files his petition within 10 days he has done everything the Bankruptcy Act contemplates.

The statute and general orders do not require exceptions to be filed as a basis for the petition for review. In the absence of a rule or order of court requiring exceptions to be filed, it is not necessary to do so. There is no rule or order of court requiring exceptions to be filed in the District of Idaho.

Loveland on Bankruptcy, 4th Ed. Vol. 1, § 94 p. 224.

This court does not take judicial notice of District Court rules.

The foregoing, covered by petitioner's first assignment of error, are the only purported law questions involved.

"It may be said generally that the exercise of the personal discretion of a court does not present a question of law, and, therefore, cannot be reviewed by an appellate court in the absence of gross abuse of such discretion.

Matters of practice in the court of bankruptcy, not regulated by statute or the general order, are generally within the discretion of the court and its action in such matters is not reviewable on petition."

Loveland on Bankruptcy, *supra*, Vol. 2, § 812, p. 1428.

"The respondent's objection that the order cannot be reviewed because no exception was taken at the time is not well founded in law. While the course pursued by the trustee and the objecting creditor in not appearing and resisting the claim at the hearing before the referee cannot be commended, it is thought that formal exceptions are not essential to the right of review. The general rule, with its qualifications, is correctly stated in Collier on Bankruptcy (9th Ed) p. 609, where it is said:

"A referee's findings of facts may be reviewed,

although no formal exceptions to his decisions are filed, where such filing is not required by a rule or order of the court. The court will not ordinarily consider for the first time questions not raised below, or issues not presented by the record; if a point is presented by the record the District Court may consider it although it was not discussed before or by the referee. The court is not barred by or confined to the matters certified by the referee; under its broad general powers it may consider any point presented by the record."

See, also, "Loveland on Bankruptcy, Vol. 1, § 94, and 95."

District Judge's Decision, Trans. p. 56 and 57, 206 F. 780-781-782.

AS TO THE QUESTIONS OF FACT,
TRANSCRIPT pp. 7, 8 & 9.

Pages 49 to 56, of petitioners Transcript of Record, sets forth the papers and records delivered to the District Judge which were before him at the time of argument; observe on page 55: "2. Record of Proceedings, pages 1 to 1540, both inclusive."

As a matter of fact all of the typewritten record of the proceedings had before the referee were before the District Judge. The testimony in the Trans. pp. 23 to 40 does not disclose whether or not these are

the pages of the record included in the report of the referee to the District Judge.

Where are the portions of the record disclosing that the petitioners were present on the dates set forth in the "Statement of Meetings" set forth on pages 72 to 80 of the Petitioners Transcript of Record? The record does not disclose whether these meetings were adjourned or occupied the full day. It is apparent that said statement is no criterion by which to prove the dates that bankrupt's attorneys were in court, nor do they claim that they were present on each of said dates set forth therein. Compare Trans. pp. 16, 17 & 18 with pp. 72, 73, 74, 75 & 76.

The Trustee and the Receiver of the State Bank of Commerce, by their petition for Review, before the District Judge, raised only questions of fact. (Trans. pp. 43 to 48). We contended, among other things, to illustrate, in paragraph 6 of our assignments of error, transcript page 46, that petitioners were not present 37 days at hearings, that on certain dates set forth in said objection no meeting of creditors were had and no appearance made by said attorneys on behalf of the bankrupt, reciting that on other dates adjournments were taken immediately or that only $\frac{1}{2}$ day sessions were held.

Permit us to refer to the decision of the Dis-

trict Judge, 206 F. 780-785. *supra*. "Unfortunately there is wanting definite information touching one, if not the most important, factor entering into the consideration of the amount to be allowed upon this account, and that is the time which was actually and necessarily spent. If there were any assurance of more specific data upon the subject I would be inclined to refer the matter back for further testimony, but apparently no account was kept and nothing better than the general estimate of the claimants, testifying from memory, is available."

The respondents do not contend, nor could they, that the bankrupt's attorneys are not entitled to reasonable fees for their services rendered. The Bankruptcy Act settles that question.

What does this matter present to this court for consideration?

The only significant question petitioners are endeavoring to have settled is the amount of fees. The trustee and receiver contended that \$2750, allowed by the referee, was excessive, the District Judge agreed with them and reduced it to \$385. The amount of fees is a question of fact and not one of law. Only law questions can be presented by petition for revision.

The Circuit Court of Appeals is entitled to the Record, if it be asked to pass upon questions of fact,

and the estate to the benefits of an appeal bond, as a much larger record is necessarily required and contemplated in the review of questions of fact than in the revision of questions of law. In the present Petition for (Review) Revision the appellate court is not provided with all the facts upon which the District Court predicated its decision, nor has an appeal bond been filed for the protection of the said estate, although both of these acts are contemplated and provided for in all cases in which an appeal is taken.

It is difficult to perceive how error of law could be predicated on the District Judge's decision, because it is made upon evidence from which men of different minds might draw different conclusions, and a question of this nature is a question of fact reviewable by *appeal* and not by *petition* for revision.

"A decision of a court of bankruptcy allowing or rejecting a claim of \$500 or over *is reviewable by the Circuit Court of Appeals only upon an appeal taken within 10 days* as provided by Bankruptcy Act, July 1, 1898, c. 541, § 25a, 30 Stat. 553, (U. S. Comp. St. 1901, p. 3432)."

Postlethwaite v. Hicks 165 F. 897 C. C. A. 4th Circuit, 1908.

"On a petition in bankruptcy to superintend and revise, the appellate court can review only questions

of law and *cannot disturb the trial court's findings of fact.*"

In re Irwin et al, 174 F. 642. C. C. A. 3rd Circuit. 1909.

"We cannot determine questions of fact involved in the finding or order sought to be reviewed."

In re Stewart 179 F. 222-228. C. C. A. 6th Circuit, 1910.

"Disputed questions of fact cannot be reviewed on a petition to revise authorized by Bankruptcy Act July 1, 1898, c. 541, § 24b, 30 Stat. 553 (U. S. Comp. St. 1901. p. 3432.)"

In re Witherbee 202 F. 896 C. C. A. 1st Circuit, 1913.

We respectfully submit that the petition for (review) revision should be dismissed, the transcript of the record in support thereof should be stricken, and the District Judge affirmed.

Dated January 10th, 1913.

E. N. LA VEINE,

Attorney for Respondent, Trustee,

Residence Coeur d'Alene, Idaho.

JOHN H. WOURMS,

Attorney for Respondent, State Bank of Commerce,

Residence Wallace, Idaho.

We received a copy of the foregoing motion on

thisday of February, 1914, at Coeur d'Alene,
Idaho.

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Attorneys for Petitioners.